APPENDIX "A"

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 81-2099
and
No. 81-2188

UNITED STATES OF AMERICA,	*	
	*	
Appellee,	*	Appeal from
	*	the United
v.	*	States District
	*	Court for the
JEROME DALY,	*	District of Minn.
and	*	Fourth Division
LARRY S. PENDELL,	*	
	*	
Appellants.	*	

Submitted: May 18, 1982

Filed: August 18, 1982

Before BRIGHT and JOHN R. GIBSON,
Circuit Judges, MARKEY,* Judge.

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* The Honorable Howard T. Markey, Chief Judge, United States Court of Customs and Patent Appeals, sitting by designation.

PER CURIAM.

Jerome Daly and Larry S. Pendell appeal their conviction by jury verdict in the United States District Court of Minnesota, for possession of marijuana with intent to distribute in violation of 21 U.S.C. §841(a)(1). We affirm.

Background

On or about November 17, 1980, a confidential, reliable source informed Narcotics Agent Baltzer that Daly would receive an aircraft load of marijuana at the Flying Cloud Airport in Eden Prairie, Minnesota on or about November 19. Agents set up surveillence points at the airport museum and at two hangars near Daly's hangar.

At approximately 11:30 p.m. on November 19, 1980, agents observed Pendell land his airplane. At 12:20 a.m. Daly arrived and opened his hangar door. Pendell taxied to the hangar and, with Daly's help, pushed the plane inside. Daly and Pendell left in Daly's car.

Shortly before 5:00 a.m., Daly and Pendell returned in an Oldsmobile and Plymouth, parking the Oldsmobile near the hangar door. Agents observed Daly and Pendell carry loaf-

the Speedy Trial Act, §§3161 and 3162.[1] We disagree. The Act provides that when the government dismisses a complaint, followed by indictment, the interim period is excluded from the computation of applicable time limitations. United States v. MacDonald, 50 U.S.L.W. 4347, 4349 n.7 (1982); United States v. Jones, 676 F.2d 327, 330 (8th Cir. 1982). Under §3161(d), the time limits of the Act run anew with the filing of the indictment. See United States v. MacDonald, 50 U.S.L.W. at 4347; United States v. Peters, 587 F.2d 1267, 1273 (D.C. Cir. 1978). Accordingly, Judge MacLaughlin correctly denied defendants' pretrial motion to dismiss the indictment.[2]

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[1] Daly vigorously, but vainly, also argues that the district court lacked subject matter jurisdiction. 18 USC §3231 provides that the district courts "shall have original jurisdiction...of all offenses against the laws of the U.S....."

[2] Two courts have indicated in dicta the view that the government should not be allowed to dismiss a complaint and start the clock anew. See United States v. Peters, 587 F.2d at 1273; United States v. Hilleges, 578 F.2d 453, 459 n.9 (2d Cir. 1978).

Section 3161(d) provides that the trial of a defendant charged in an indictment shall commence within 70 days from the indictment filing date. The trial, originally scheduled for May 26, 1981 (within 70-day period), was delayed until Aug. 3, 1982 (outside 70-day period), in response to Daly's requests for continuances.

shaped bales from the hangar to the Oldsmobile's trunk. Agent Baltzer testified that the shape and apparent weight of the bales were characteristic of bales used to transport marijuana. Daly and Pendell then moved the Plymouth near the hangar door and began loading bales into it. At 5:15 a.m., the agents arrested both men. At that time, Baltzer observed a bale with torn wrapping in plain view on the back seat of the Plymouth. Observing what appeared to be marijuana, he removed the bale from the car and took it to the Drug Enforcement Administration Office. Agents drove the two cars to the Minneapolis federal courthouse, obtained search warrants for them and the airplane, and discovered additional evidence.

On December 15, 1980, the complaint against Daly and Pendell was dismissed without prejudice, on the government's motion, to enable further investigation and presentation to the grand jury. An indictment charging violation of 21 U.S.C. §841(a)(1) issued on April 10, 1981. The jury trial, commencing on August 3, resulted in a guilty verdict on August 11, 1981.

OPINION

Daly and Pendell allege that the 4½ month delay between arrest and indictment violated

Alleging undue delay following dismissal of the complaint, Daly and Pendell assert that their due process rights were violated. They fail, however, to show any actual prejudice from an unreasonable delay by the government. See United States v. Lovasco, 431 U.S. 783, 789-90 (1977); United States v. Rogers, 639 F.2d 438, 440 (8th Cir. 1981); United States v. Taylor, 603 F.2d 732, 735 (8th Cir.), cert. denied, 444 U.S. 982 (1979). This case involves investigative delay. Unlike delay undertaken to gain a tactical advantage over a defendant, investigative delay has been consistently held reasonable and in accord with due process. United States v. Lovasco, 431 U.S. at 796; United States v. Houd, 593 F.2d 293, 296 (8th Cir. 1979).

Daly and Pendell argue that they were arrested without probable cause and, therefore, all evidence seized should have been suppressed. The argument fails because the agents had probable cause to arrest. Where, as here, the informant's tip is corroborated by independent sources and the informant previously has provided reliable information, there is probable cause to arrest. Spinelli v. United States, 393 U.S. 410, 417-18 (1969); Draper v. United States, 358 U.S. 307, 312-14 (1955);

United States v. Sanders, 631 F.2d 1309, 1312 (8th Cir.), cert. denied, 449 U.S. 1127 (1981).[3]

Daly's argument that he was unlawfully arrested because the agents violated a "zone of privace", allegedly existing between the cars and his hangar door; is equally meritless. Daly's asserted expectation of privacy at a public airport is not the reasonable expectation protected by the Fourth Amendment. Daly's activities there could have been observed by other pilots, mechanics, visitors, and maintenance people in the area. See Katz v. United States, 389 U.S. 347, 352-53 (1967); United States v. Luschen, 614 F.2d 1164, 1173 (8th Cir.), cert. denied, 446 U.S. 939 (1980); United States v. Eisler, 567 F.2d 814, 816 (8th Cir. 1978).

Daly and Pendell's argument to the contrary notwithstanding, seizure of the torn bale, albeit without a warrant, was constitutionally permissible under the plain view

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[3] The informant's knowledge requirement of Aquilar v. Texas, 378 U.S. 108, 110-15 (1964), may be met by the independent corroboration test announced in Draper and applied by this circuit in United States v. Marihert, 472 F.2d 809, 812 (8th Cir. 1972); United States v. Mitchell, 425 F.2d 1353, 1358-61 (8th Cir.), cert. denied, 400 U.S. 853 (1970).

doctrine. The seizure complies with the three-step analysis established by the Supreme Court in Coolidge v. New Hampshire, 403 U.S. 445, 466-73 (1971) and applied by this circuit in United States v. Sanders, 631 F.2d at 1314; United States v. Pugh, 566 F.2d 626, 627 (8th Cir.) cert. denied, 435 U.S. 1010 (1978). First, the initial intrusion affording plain view was lawful, Daly and Pendell being lawfully arrested while standing near the Plymouth, the agents being legitimately positioned to view the evidence. Second, discovery of the marijuana was inadvertent. Third, the potentially incriminating nature of the evidence was immediately apparent.[4]

The agents acted lawfully in driving the two cars from the airport to the federal building without a warrant. Law enforcement officers may seize and impound a vehicle, which they have probable cause to believe contains contraband, until a warrant can be obtained. United States v. Collins, 532 F.2d 79, 84-85 (8th Cir.), cert. denied, 429 U.S. 836 (1976).

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[4] It is unnecessary to find the seizure permissible under the search-incident-to-lawful-arrest or automobile exceptions.

Judge MacLaughlin correctly denied defendants' motion to dismiss the indictment, made on the ground that classification of marijuana as a Schedule I substance under 21 U.S.C. Sec. 812 violated their due process and equal protection rights under the Fifth Amendment. Classification of marijuana in Schedule I is rationally related to the achievement of a legitimate government objective and does not violate the Fifth Amendment. See United States v. Erwin, 602 F.2d 1183, 1185 (5th Cir.), cert. denied, 444 U.S. 1071 (1980); National Organization for Reform of Marijuana Laws, 488 F. Supp. 123, 134-37 (D.C. Cir. 1980).

Daly and Pendell's assertion of error in refusal to give their proposed instruction, to the effect that the jury must consider whether their intent, as described in Delay's testimony, was to obtain a declaratory judgment authorizing distribution of the marijuana to cancer patients, is without merit. The objection was not properly preserved for appeal, and the requested instruction itself did not properly state the law. Moreover, it is sufficient that the instructions as a whole, as they did here, adequately cover the substance of the requested instruction. United States v. Hopping, 668 F.2d 398, 399-400 (8th Cir. 1982). Judge MacLaughlin correctly instructed the jury that the offense

required the "specific intent to distribute" the marijuana, and "proof of specific intent to violate the law." The defense theory was extensively argued to the jury. If the jury believed Daly and Pendell intended to distribute the marijuana to cancer patients, it would have acquitted pursuant to the instructions given.

AFFIRMED

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT

[Not to be published.]

APPENDIX "B"

United States Court of Appeals
For the Eighth Circuit
U.S. Court & Custom House
1114 Market Street
St. Louis, Missouri 63101

August 18, 1982

Dear Sirs:

Enclosed is a copy of the opinion of this Court filed today in the above case. Judgment in accordance with the opinion is also entered today. This opinion will not be published in accordance with directions received from the Court.

Please consult the appropriate Federal Rules of Appellate Procedure and the Eighth Circuit Rules (15 & 16) for post-opinion procedure, particularly circuit Rule 16(d).

Sincerely,

Robert D. St. Vrain
Clerk of Court